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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 392

In the Matter of THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor

WALTER E. MEYER,

Petitioner,

vs.

JOSEPH B. FLEMING AND AARON COLNON, as Trustees of The Chicago, Rock Island and Pacific Railway Company,

Respondents.

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

Opinions Below

The opinion of the Circuit Court of Appeals appears in the record at page 61 and is reported in 149 F. 2d 529. The order of the District Court appears in the record at R. 49, and has not been reported.

The merits of petitioner's claim in this case have previously been passed upon by the Interstate Commerce Commission, its reports and orders appearing in *St. Louis*

Southwestern Plan of Reorganization, 249 I. C. C. 5, 46-149; 252 I. C. C. 325, 330-338; and by the District Court of the United States for the Eastern District of Missouri in *In re St. Louis Southwestern Railway Company*, 53 F. Supp. 914, 924-927. Also, the Circuit Court of Appeals for the Second Circuit affirmed a judgment of the U. S. D. C., S. D. N. Y., 11 F. Supp. 937, refusing jurisdiction of a derivative suit brought by petitioner as a stockholder against a large number of defendants (apparently not including respondents or their debtor Chicago, Rock Island & Pac. Ry. Co.) claimed to arise out of the same matters as those involved in the present case *Meyer* v. *Kansas C. So. Ry. Co.* (1936), 84 F. 2d 411. This Court denied certiorari, 299 U. S. 607; No. 510, O. T. 1936.

An order of the District Court of the United States for the Eastern District of Missouri denying petitioner leave to prosecute the instant case in behalf of the St. Louis Southwestern Railway Company is not reported nor does it appear in the record. The papers relating to this order have, however, been supplied to the Court and appear in the appendices to the brief in opposition to the petition for certiorari (p. 19) and in petitioner's reply brief in support of the petition (pp. 17-34).

Jurisdiction

The judgment of the court below was entered June 6, 1945 (R. 66). The petition for writ of certiorari was filed August 31, 1945. The writ was granted October 22, 1945 (R. 70). Petitioner asserts jurisdiction in this Court based on § 240(a) of the Judicial Code (28 U. S. C. § 347(a)).

Questions Presented

1. Whether a stockholder of a railroad company who brings a derivative action on behalf of his corporation has, after a petition for reorganization of his company

has been filed and is pending under § 77 of the Bankruptcy Act, status or standing to continue the suit in the absence of his showing authorization to do so by the reorganization court.

2. Whether such a suit can be continued where the reorganization court has considered and has denied leave to the stockholder to continue the suit.

3. Whether a claim in a railroad reorganization proceeding under § 77 of the Bankruptcy Act, filed by a stockholder on behalf of his corporation, is properly presented where the stockholder fails to make his corporation, or its trustee in bankruptcy thereafter appointed, a party to the proceeding.

4. Whether a person filing a derivative claim in a reorganization proceeding under § 77 of the Bankruptcy Act has standing to continue his championship of the derived claim where the court refuses him leave to proceed further, and no abuse of the court's discretion is shown.

Statutes Involved

The statutes involved are set forth in the appendix.

Statement

Petitioner renews in this Court a series of charges which he has made against The Chicago, Rock Island and Pacific Railway Company and other railroads for nearly twelve years. He does not sue on his own direct behalf, but has brought the various proceedings on behalf of a railroad corporation in which he held a substantial stock interest, The St. Louis Southwestern Railway Company. The instant proceeding is merely one phase of a long history of litigation in which petitioner has engaged in support of his charges of conspiracies involving loss to the stock-

holders of St. Louis Southwestern. To show the present case in its perspective, this statement first sets forth the earlier history, followed by a statement of the present case itself:

Earlier Proceedings

Petitioner became a stockholder in The St. Louis Southwestern Railway Company in 1920 (R. 15), and was a director of that company during 1926-1927, and from June, 1928, until at least April, 1934 (R. 2). A dominating stock interest in St. Louis Southwestern had been acquired in March, 1925, by The Chicago, Rock Island and Pacific Railway Company, and held by it until October, 1925, when, failing approval by the Interstate Commerce Commission, the stock was sold to the Kansas City Southern Railway Company. In 1927, the Interstate Commerce Commission refused to approve the acquisition of control by Kansas City Southern of St. Louis Southwestern and another railway; and Kansas City Southern, in turn, divested itself of the stock, selling it to a syndicate in 1929. In 1930, the stock was sold to the Southern Pacific. This transfer was approved by the Interstate Commerce Commission (R. 17-19). Petitioner, as a director of St. Louis Southwestern, had always favored union of his line with the Southern Pacific System, and did what he could to bring it about. He was dismayed when acquisition of control by Southern Pacific was approved by the Interstate Commerce Commission without requiring that holders of minority stock be given an opportunity to sell at the same price per share that had been paid for the majority stock (R. 25-26).

It is a matter of fair inference from these facts that petitioner's disappointment at this action by the Interstate Commerce Commission thereafter led him to disavow his earlier views and efforts favoring Southern Pacific con-

trol, and even charge Rock Island (of whom respondents are § 77 trustees) with being part of a conspiracy to ruin St. Louis Southwestern—based on the brief ownership by Rock Island of a majority interest in stock of St. Louis Southwestern years earlier (1925). In fact, the Interstate Commerce Commission reiterated its own finding that petitioner's efforts are not founded in good faith on behalf of St. Louis Southwestern, but are founded upon his desire to better his own position at the expense of other stockholders. In *St. Louis S. W. Ry. Co. Reorganization*, 252 I. C. C. 325, 337, it is stated:

> "Petitioner's [Meyer's] point VII is that certain of our findings and a quotation from the debtor's brief should be stricken from our prior report as reflecting on his credibility as a witness. The findings objected to are that his apparent animating purpose had been to obtain from the Southern Pacific a consideration for his stock in excess of the offer made by the Southern Pacific to the debtor's stockholders in *St. Louis S. W. Ry. Co. Control*, 180 I. C. C. 175, * * * These findings are in our view sufficiently supported by the entire record, and the request that they be stricken is denied."

St. Louis Southwestern filed its petition in bankruptcy on December 12, 1935, in the District Court of the United States for the Eastern District of Missouri (R. 24, 8, 11).

As is shown below, about ten months following the initiation of bankruptcy proceedings with respect to Rock Island in 1933, petitioner filed a derivative claim on behalf of St. Louis Southwestern in the Rock Island proceedings —over a year prior to the time St. Louis Southwestern itself went into bankruptcy. Petitioner thereafter proceeded with a suit for receivership in the federal district court in New York, again asserting his claims of conspiracy amongst Southern Pacific and Kansas City Southern and others (which in the present proceeding he claims were con-

tributed to by Rock Island), and praying the appointment of a receiver to assert the demand for damages on behalf of St. Louis Southwestern. The petition was dismissed by the district court for want of jurisdiction (11 F. Supp. 937). The judgment was affirmed by the Circuit Court of Appeals for the Second Circuit (84 F. 2d 411), which held that there was no necessity for a receiver in any event since St. Louis Southwestern was undergoing reorganization pursuant to § 77, and the reorganization court had directed the trustee to investigate and report facts pertaining to irregularities, etc., by reason of which the company might have a cause of action. This Court denied a writ of certiorari, 299 U. S. 607; No. 510, O. T. 1936.

Petitioner did not halt at the proceedings in the *Rock Island* case and the application for a receiver in New York. He intervened in the proceedings before the Interstate Commerce Commission concerning the plan of reorganization of St. Louis Southwestern which had been referred to the Commission in accordance with § 77 of the Bankruptcy Act. Before the Interstate Commerce Commission more than 5,000 pages of testimony were taken on the contentions of petitioner which form the basis of his claim in the present proceeding (R. 35). The Commission approved the plan of reorganization on June 30, 1941, and in its order dealt with the claim of petitioner against Rock Island, and found that petitioner had not adduced sufficient evidence of a claim against Rock Island and the other alleged conspirators to justify further investigation; and it found that petitioner and other stockholders of St. Louis Southwestern no longer had an equity and were not entitled to participate in the plan (249 I. C. C. 5, 46-150; 252 I. C. C. 325). The Commission, too, agreeing with the Circuit Court of Appeals for the Second Circuit, expressed the view that petitioner was without standing to bring a derivative suit, and noted that the trustee of

St. Louis Southwestern had been directed to investigate and report to the court any facts pertaining to irregularities and that he had, in fact, reported on such matters (R. 35-36). One Commissioner (Eastman) dissented from the order of the Commission approving the plan for reorganization of St. Louis Southwestern; but he did so on the ground that the plan did not consolidate Southern Pacific and St. Louis Southwestern. Although petitioner has laid great store by Commissioner Eastman's dissenting opinion (R. 15), Commissioner Eastman, while paying polite respect to petitioner's interest and persistence, expressed his belief that petitioner "has conjured up conspiracies which go beyond the reasonable probabilities of the situation" and that petitioner had not proved the diversions of traffic which he believed were made. Although once having favored an investigation of Meyer's (petitioner's) charges, Commissioner Eastman expressed his view that he did not then favor the continuation by the Commission of an inquiry into them.

In the reorganization court, petitioner renewed his charges of conspiracy in the proceeding relating to the approval of the plan of reorganization of St. Louis Southwestern. Here again, petitioner was given a full hearing. The district court found against petitioner's contentions (53 F. Supp. 914, 924-927). The court reviewed the directions it had given to the trustee and the reports made by the trustee in a period of over six years respecting petitioner's charges. The court held, 53 F. Supp. at p. 926:

> "The Trustee was never able to find any basis for the institution of legal proceedings in behalf of the debtor against any of the parties accused, and we do not understand that Meyer [petitioner] accuses the trustee of any bad faith or lack of diligence in this respect."

The court further held, 53 F. Supp. at p. 926:

> "We believe that ample opportunity has been afforded to Mr. Meyer by the Commission and by the Court to present evidence in support of his various allegations and objections, and that the time elapsed during the pendency of these proceedings has afforded ample time for him to fully prepare his case. He has not convinced either this Court or the Commission that his charges are well-founded."

The Present Proceeding

Rock Island, of whom respondents are trustees under § 77 of the Bankruptcy Act, filed its petition in bankruptcy on June 7, 1933, in the District Court of the United States for the Northern District of Illinois (R. 3). On April 26, 1934, petitioner, for himself and other minority stockholders, filed a proof of claim in the Rock Island proceeding on behalf of St. Louis Southwestern, excusing his failure to demand that the board of directors of St. Louis Southwestern file such claim on the ground that the demand would be useless and futile (R. 2-3). The petitioner made the astronomical claim of $31,593,874, on the ground that participation by Rock Island, through its stock ownership in St. Louis Southwestern, as above set forth, for a brief period in 1925, had resulted in a debt of Rock Island to St. Louis Southwestern, consisting of (1) damages directly incurred by St. Louis Southwestern during the time Rock Island owned the stock, in the amount of $1,341,928; (2) sale of the dominant stock interest to Kansas City Southern, thus making possible later actions of the alleged conspirators damaging St. Louis Southwestern in the amount of $27,784,946; and (3) a profit of $2,467,000 alleged to have been realized from Kansas City Southern by Rock Island on the stock over and above the reasonable value of the stock (R. 5).

The case was heard by a master on the question whether petitioner has standing to continue the prosecution of the claim in view of the appointment of a trustee for St. Louis Southwestern. The master reported (R. 34-47) that petitioner lacks standing to prosecute this claim by reason of the fact that exclusive jurisdiction for such purposes had vested in the United States District Court for the Eastern District of Missouri, which has not authorized petitioner to continue the claim; that the reason for prosecution by petitioner of the derivative suit ceased when a trustee was appointed under § 77; and that the claim had not been properly filed in any event, because petitioner had failed to bring before the court either St. Louis Southwestern or its trustee—they being indispensable parties to the maintenance of a derivative suit.

The District Court, on February 7, 1944, affirmed the report of the master and entered an order (R. 49-52) finding that the petitioner has no right to prosecute the cause of action.

Immediately, petitioner moved the court wherein St. Louis Southwestern bankruptcy proceeding was pending for leave to continue prosecution of the claim against Rock Island; and after that court considered the affidavits filed by petitioner in support of his motion, and had heard counsel on it, denied the motion (Appendix to Petitioner's Reply Brief on Certiorari, p. 23; appendix to Respondents' Brief in Opposition, p. 19).

The Circuit Court of Appeals affirmed the District Court (R. 61) on the ground that under § 77(a) exclusive jurisdiction of St. Louis Southwestern and its property had vested in the Missouri district court; and that that court had all the powers which a federal court would have if it had appointed a receiver in equity of the property of a debtor for any purpose. The court found the law established that after a federal court had appointed a receiver,

stockholders could not, without leave of court, maintain a stockholders' derivative suit.

Summary of Argument

The provisions of § 77 of the Bankruptcy Act that the court approving the petition of a railroad for reorganization shall have and may exercise all the powers of a federal court which had appointed a receiver in equity for any purpose, and that the trustees of the debtor shall have all the powers of a trustee appointed in ordinary bankruptcy proceedings, make applicable the rules respecting stockholders' derivative suits which have always been applied in equity and bankruptcy proceedings. The claims advanced by petitioner are rights of St. Louis Southwestern Railway, not of petitioner individually. The reason for a derivative suit fails when a receiver or trustee in bankruptcy is appointed, since the court then controls the corporation's affairs and a hostile board of directors can no longer bar assertion by the corporation (through the trustee or receiver) of its claims. The cases are plain that, upon the appointment of a receiver or trustee in bankruptcy, stockholders and others lose status or standing to prosecute derivative claims on behalf of the insolvent corporation. They are protected through their right to appeal to the court for instructions to require the receiver or trustee to prosecute the action—or, if that shall seem wise, leave themselves to prosecute it.

Petitioner has no standing to prosecute this claim in defiance of the established rule merely because he filed the claim prior to the time his corporation became a § 77 debtor. Petitioner acquired no vested right in the corporation's cause of action; it is and has always been the property of the debtor. Such cases as deal with derivative actions commenced prior to receivership have held that the stockholders' suit must fail upon the appointment of

a receiver, unless the stockholders receive leave of the receivership court to proceed with the action.

While it is established that a stockholder may not, without leave of court, proceed with a derivative action where a receiver of his corporation has been appointed, here there is the further fact that the court of that receiver's appointment has affirmatively denied petitioner leave to prosecute his claim. In the light of the hearings which petitioner has had for more than a decade respecting his claims on behalf of his debtor, including lengthy proceedings in which petitioner participated in the Interstate Commerce Commission and full investigations and consideration of petitioner's charges by the court having jurisdiction of the St. Louis Southwestern proceeding, it cannot be suggested that there was any abuse of discretion in refusing petitioner leave to proceed with this case.

In the present case, petitioner never joined St. Louis-Southwestern, or its trustees when appointed, or in any manner brought them before the court below, in all the many years which followed his filing the claim on behalf of that railway. It is settled that a derivative claim may not be prosecuted in the absence of the corporation which owns it, since the corporation's claim can be determined and the corporation concluded by the judgment only if it is before the court. Accordingly, no proper claim was ever filed and petitioner was properly denied permission further to pursue it. The judgment of the court below must be sustained on this ground, which was relied on by the master and the district court.

Not merely is St. Louis-Southwestern in reorganization, but Rock Island (of whom respondents are trustees) is, too. Petitioner is claiming, but has been denied, leave further to proceed against respondents by the court which appointed them. The settled rule is that a receiver cannot be sued without the consent of the court of his appoint-

ment; and such consent is jurisdictional. The only question inherent in such a situation is whether the district court abused its discretion in denying petitioner leave further to proceed; and in the light of the extensive hearings petitioner has had, no abuse of discretion can be found.

Argument

1. Section 77 of the Bankruptcy Act, as it now reads, provides that if a petition of a railway company for reorganization is approved by a Federal district court, that court shall have "exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose." Subsec. (a). The trustees appointed by the court shall exercise all the powers of a trustee appointed pursuant to ordinary bankruptcy proceedings (section 72), and the powers of an equity receiver—but these powers are expressly provided to be subject to the control or authorization of the judge. Subsec. (c) (2). It is further provided that "the rights and liabilities of creditors, and of all persons with respect to the debtor and its property" shall be the same as if a voluntary petition for adjudication has been filed and a decree of adjudication entered. Subsec. (l). That is to say, after a petition under § 77 is filed and approved, there is placed upon the court responsibility for seeing to the rights of everyone in connection with the debtor and its property.

As originally enacted (Act of March 3, 1933, c. 204, 47 Stat. 1467, 1474), Section 77 provided in subsection (a) merely that when a petition for reorganization is approved, "the court in which such order approving the petition is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive

jurisdiction of the debtor and its property wherever located." In an amendment adopted by Act of August 27, 1935 (c. 774, 49 Stat. 911), the provision just quoted was supplemented by the following additional language:

> "* * * and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

Manifestly, this enlarges the jurisdiction previously granted; and in granting such enlarged jurisdiction, Congress expressly had incorporated with respect to railroad reorganization cases the established case law dealing with property of the debtor.[1]

Part of the property of the debtor, St. Louis Southwestern, according to petitioner, is a claim against certain other railroads for bringing the debtor to financial ruin. That right is a right of the debtor—not of petitioner, who is merely a stockholder. *Hawes* v. *Oakland*, 104 U. S. 450; *Porter* v. *Sabin*, 149 U. S. 473, 478; *Swope* v. *Villard* (C. C. S. D. N. Y., 1894), 61 Fed. 417; In re *Swafford Bros. Dry Goods Co.* (W. D. Mo. 1910), 180 Fed. 549, 555; *Kelly* v. *Dolan* (C. C. A. 3d, 1916), 233 Fed. 635, 638.

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[1] In the hearings before the House Committee on the Judiciary with respect to the bill which amended § 77 (Hearings on H. R. 8507, 74th Cong., 1st Sess., p. 141), it was clearly realized that the effect of the amendment was to add to the powers of a bankruptcy court, previously granted the powers of the equity court in equity receiverships. And see the remarks of Mr. Sumners, Chairman of the House Committee, in the debate on the same bill, 79 Cong. Rec. (pt. 12) 13209:

> "There is an effort in this arrangement to combine what is known as the 'general equity' powers of the court and the bankruptcy powers of the court."

While the reports of the committees are silent as to the purpose of the added language, the foregoing confirms its plainly apparent purpose—that of extending the jurisdiction of the equity court to these proceedings.

If petitioner is correct in his contentions as to the rights of St. Louis Southwestern against respondents, then this property of the debtor is within the jurisdiction of the District Court of the United States for the Eastern District of Missouri, which is bound, under the law, to see to the protection of all persons interested in that property. To that court petitioner has always possessed a right of resort. If petitioner be correct as to the debtor's rights that court (originally, or as the result of an appeal[2] to the Circuit Court of Appeals for the Eighth Circuit, or review by this Court if need be) will see that the right of the debtor is vindicated. That court possesses the full facilities of administration of the entire estate throughout the United States, together with the investigatory means and talents of the Interstate Commerce Commission (§ 77 [*l*]), as a basis for determining the substantial nature of petitioner's assertions on the debtor's behalf. If those claims of the debtor have merit, if a recovery is had, that recovery for the debtor will be available for expenses, for bondholders in their turn under their respective contracts, for general creditors, conceivably even for persons of whose class petitioner is one, stockholders.

Petitioner's standing to proceed with claims such as those advanced here is merely derivative—the rights not being a personal or proprietary interest of his, but rather of the debtor in which he held a stock interest, he derived status or standing to sue upon them from the asserted fact that the board of directors of the debtor, before it went into reorganization, would not have authorized the suit against the railway company of which respondents are trustees, even had petitioner asked his board of directors to proceed. But the reason for such proceeding vanishes with the assumption of jurisdiction by the bankruptcy court under § 77.

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[2] See *Klein* v. *Peter* (C. C. A., 8th, 1922), 284 Fed. 797, 800-801.

The bankruptcy court stands in the place of the railroad corporation in reorganization. It not only can, but must, see to the protection of assets of the railroad. Petitioner is protected by the court: "The court is charged with the duty of protecting all security holders of the debtor whose property has been transferred to its jurisdiction. This includes stockholders as well as creditors." *In re Chicago & N. W. Ry. Co.* (C. C. A. 7th, 1941), 121 F. 2d 791, 798. There is no longer a reason for petitioner to champion this asserted property of the railroad.

The case law is consistent throughout on this effect of receivership or bankruptcy on derived actions. Since *Porter* v. *Sabin*, 149 U. S. 473, it has been plainly understood that with receivership, with power and responsibility in the court for seeing to the rights of the receivership corporation, the reason for the rule permitting suits on derived causes of action fails, and the stockholder (or creditor) who asserts the right on behalf of the receivership corporation thereafter looks to the receivership court for vindication of the claim—and not to his own suit or action on its behalf. The stockholder, after receivership, may show to the receivership court every fact which he believes justifies suit. To the extent that he is asserting matters of substance, that court will protect the debtor's rights. To the extent that he is merely venting spleen over his disappointment or "dismay" (R. 25-26); or to the extent that he is officiously intermeddling in the affairs of the debtor—perhaps, as a "striker," in the hope of being so annoying that his claim will be bought off for its nuisance value at a price beyond what other stockholders or creditors might receive[3]—the receivership court will refuse

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[3] "• • • As a result of the filing of the petition in this case, the court, not the stockholders, acquired exclusive dominion and control over the estate. Hence, any strategic position occupied by the stockholders prior to these proceedings vanished once the court invoked its jurisdiction.

him leave to proceed.' But since there is no longer reason for his continuing the suit without respect to the wishes of the corporate officers—whose place is now taken by the court—he has no independent right apart from the express authorization of the court to continue with the suit.

In *Porter* v. *Sabin*, 149 U. S. 473, 479, this Court, holding a stockholders' derivative suit on behalf of their corporation for fraudulent wrongs of officers could not be maintained in the light of the receivership of their corporation, stated:

> "When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. *Wiswall* v. *Sampson*, 14 How. 52, 65; *Peale* v. *Phipps*, 14 How. 368, 374; *Booth* v. *Clark*, 17 How. 322, 331; *Union Bank* v. *Kansas City Bank*, 136

Threats by stockholders of the kind here in question are merely threats to the jurisdiction of the court, which jurisdiction these selfsame stockholders invoked for their benefit when they caused the debtor's petition to be filed. Consequently, these claims of the stockholders are, as we have said, entitled to no more dignity than any claim based upon sheer nuisance value." *Case* v. *Los Angeles Lumb. Co.*, 308 U. S. 106, 129-131.

"The Bankruptcy Amendment of 1932 was intended to defeat the efforts of nuisance value makers. They were no more popular with Congress than they had been with the courts. *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 129. To both, they were looked upon as parasites. By permitting railroads to reorganize under the Bankruptcy Act, it was hoped their efforts would be frustrated. This was the object of Congress, the purpose of the Amendment, Sec. 77. • • •" In re *Chicago & N. W. Ry. Co.* (C. C. A., 7th, 1942), 126 F. 2d 351, 366.

These principles are particularly apposite here, where it appears from the report of the Interstate Commerce Commission in *St. Louis S. W. Ry. Co. Reorganization*, 252 I. C. C. 325, 337, that petitioner's "animating purpose had been to obtain from the Southern Pacific a consideration for his stock in excess of the offer made by the Southern Pacific to the debtor's [St. Louis Southwestern's] stockholders."

U. S. 223; *Thompson* v. *Phenix Ins. Co.*, 136 U. S. 287, 297.

"It is for that court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the those interested in the estate. * * *"

In *Austin* v. *Garard* (C. C. A. 7th, 1932), 61 F. 2d 129, a derivative action by stockholders was dismissed, the court holding:

"* * * Appellants' remedy is not to file a petition and seek relief which is in the nature of a separate bill of complaint. They could, and should, if the facts warrant it, bring to the receiver's and the court's attention, facts which disclose new assets and new choses in action or liabilities for which the receiver might bring suit. If the receiver fails to pursue individuals or companies, or groups of indiyiduals and companies, be they officers or directors of the companies, after its attention has been brought to facts showing such liability, the petitioners' remedy is clear. They may apply to the court and cause the receiver to be removed. While the instant case seems to be one where the misconduct of the officers naturally tends to make the defrauded investor 'see red' and to chafe at delays, the orderly administration of the affairs of the trust will best and most effectively promote the interests of all. No facts indicating any laxity or failure on the part of the receiver to enforce every right existing in favor of the companies are suggested in the record before us."

In *Kelly* v. *Dolan* (C. C. A. 3d, 1916), 233 Fed. 635, 638, a stockholder's derivative suit on behalf of a railroad undergoing receivership was dismissed, the court holding:

> "* * * The Central Company [the railway] is not under the domination of its directors; there is no allegation of mala fide control on their part. On the contrary, the corporation has passed from their control into that of a court of competent jurisdiction, and that court has on application declined to allow the receiver of such company to bring suit against the directors. Such being the case, it is manifest that the right of action of the corporation still remains in the corporation and its receiver, and forms part of the estate which that court is administering. To the present situation we may apply the language of the Supreme Court in *Porter* v. *Sabin*, 149 U. S. 480, namely:
>
> "'the right of action remains part of the estate of the corporation within the exclusive custody and jurisdiction of the state court.'"

The proposition has been repeatedly affirmed both in cases involving equity receiverships and cases involving bankruptcies. *Swope* v. *Villard* (C. C. S. D. N. Y. 1894), 61 Fed. 417; *In re Swofford Bros. Dry Goods Company* (W. D. Mo., 1910), 180 Fed. 549, 553; *Ames* v. *American Tel. & Tel. Co.* (C. C. Mass., 1909), 166 Fed. 820, 822-4; *Klein* v. *Peter* (C. C. A. 8th, 1922), 284 Fed. 797, 799; *Lewis* v. *Council* (E. D. N. Car., 1923), 291 Fed. 148, 156-158; *Reagan* v. *Midland Packing Co.* (C. C. A. 8th, 1925), 8 F. 2d 954; *Lewis* v. *Lilliston* (U. S. App. D. C., 1937), 89 F. 2d 847.

Petitioner's cases do not deal with derivative suits. They are not cases where the reason for the suit had vanished with the coming of receivership or bankruptcy. Thus, it is held that one holding a valid assignment of a claim of the bankrupt against others—that is, one who is the owner of the claim—might persist in his suit, nominally by the bank-

rupt, after the bankruptcy. *Thatcher* v. *Rockwell*, 105 U. S. 467, 470. And where an individual who becomes bankrupt has a personal claim for his exemption, apart from the bankruptcy estate, and no trustee has yet been appointed, he (who has a direct and individual interest which could not otherwise be protected) may sue thereon. *Johnson* v. *Collier*, 222 U. S. 538, 540. Or a bondsman, having a personal and direct interest, may persist in the suit. *In re Prudence Co.* (C. C. A. 2d, 1938, 96 F. 2d, 157, 159. A suit may continue, notwithstanding bankruptcy, if the trustee permits or authorizes it to continue for the benefit of the bankruptcy estate. *Paradise* v. *Vogtlandische M.-F.* (C. C. A. 3d, 1938), 99 F. 2d 53, 55; *Bluegrass Canning Co.* v. *Steward* (C. C. A. 6th 1909), 175 Fed. 537, 543-4. In others of petitioner's cases, the question was one of venue, as to the court wherein the trustee might try a claim on the debtor's behalf. *In re Standard Gas & El. Co.* (C. C. A. 3d, 1939), 119 F. 2d 658, 661; *United States* v. *Tacoma Oriental S. S. Co.* (C. C. A. 9th, 1936), 86 F. 2d 363. In one case, a suit by a pledgee of property in which the debtor claimed an interest was held properly stayed by the bankruptcy court. *In re Prudence Bonds Corp.* (C. C. A. 2d, 1935), 75 F. 2d 262, 263.

As set forth at the outset, Congress has provided in § 77(a) that the bankruptcy court shall have and may exercise all the powers of a Federal court which had appointed a receiver in equity for any purpose, and that the trustee shall have all the powers of a trustee appointed in ordinary bankruptcy proceedings. Since the law with respect to both receivership and bankruptcy has always been plain and explicit that upon such proceedings stockholders lose the right to maintain a derivative action, except upon affirmative consent of the equity court, it was properly con-

cluded below that the suit herein must fail for want of showing authorization to proceed.

2. Petitioner apparently bases his greatest hopes for being permitted to continue his derivative action on the fact that his derivative claim was filed prior to the time his corporation itself became the subject of a reorganization proceeding. While apparently conceding that he might not himself file the claim had the reorganization already occurred, he takes the position that the claim once filed gives him status or standing to proceed, notwithstanding the later petition for reorganization of St. Louis Southwestern.

In petitioner's circumstances there is no reason for holding that a derivative suit commenced before receivership or bankruptcy should be treated in any respect different from one instituted afterwards. There is no case which counsel on either side have found which holds that such a derivative suit commenced before receivership or reorganization may be continued thereafter without leave of the receivership court. True there are cases (not cited by petitioner) such as *Riehle* v. *Margolies*, 279 U. S. 218 (Brandeis, J.) and *Chicago Title & Tr. Co.* v. *Fox Theatres Corp.* (C. C. A. 2d, 1934), 69 F. 2d 60, which hold that notwithstanding receivership a claim *against* a receivership corporation on which suit was instituted by a *creditor* prior to the receivership may be continued thereafter for the sake of liquidating the creditor's claim. Such cases are of a class with those cited by defendant which we have already distinguished above. All such cases, however, go to the rights of the person asserting his own claim, and not to the rights of one whose assertion of claim is derivative merely and belongs to the debtor itself. Petitioner's argument, therefore, reduces to the proposition that in some way he acquired a personal right in the action which vested at or prior to the time the reorganization of his corporation was

undertaken." That is equivalent to an assertion that what originally started as a claim of St. Louis Southwestern has now become the property of petitioner himself. We submit that there is no basis in the law or in reason for such assertion of vested right.

In the cases which have dealt with a derivative claim filed prior to a receivership, the courts have held that the receivership supplanted the rights to sue which the plaintiffs might otherwise have had. In *Adler* v. *Seaman* (C. C. A., 8th, 1920), 266 Fed. 828, 836, where, following a stockholders' derivative suit against the officers and directors of a street railway company for wasting of its assets, a receivership was instituted at the behest of creditors, the court, in holding that the consolidation of the two suits was in error, held:

> "* * * When the receiver was appointed, he acquired, under the broad terms of his appointment, the rights of the corporation to prosecute such character of suit for waste. [*Porter* v. *Sabin* is then stated and quoted.] * * *
>
> "It is thus clear that the receiver in the Adler [creditor's] bill would have been a necessary party to any action such as Seaman [the stockholder] brought, had Seaman commenced his action after appointment of the receiver in the Adler suit. The circumstance that such suit was pending when the Adler receiver was appointed cannot alter or affect this rule. The receiver is not a party to that suit. He can become such only by an order of the court [citing cases], although he might be made so by such an order [citing cases] * * *"

The point was reaffirmed in *Seaman* v. *McCulloch* (C. C. A. 8th, 1925), 8 F. 2d 820, 825-6.

In *Coyle* v. *Skirvin* (C. C. A., 10th, 1942) 124 F. 2d 934, certiorari denied 316 U. S. 673, No. 1050 O. T. 1941, in which the receivership followed the filing of the stock-

holders' derivative suit, it was held that the stockholder's suit must fail, the court stating:

> "It is well settled that where a receiver has been appointed for a corporation he is an indispensable party to a stockholder's derivative action. Such an action should be brought by the receiver; and cannot be maintained against the receiver without the consent of the court which appointed him.
>
> "It follows that the plaintiffs could not maintain the action as a derivative stockholders' suit."

3. Petitioner has never shown to the District Court in this case that he was authorized by the court in which his corporation was undergoing reorganization to maintain this derivative claim. It has been held (*Swope* v. *Villard* [C. C. S. D. N. Y., 1894], 61 Fed. 417, 420):

> "* * * Neglect and dereliction of duty can hardly be charged against a court; especially, in one federal court against another. The refusal of the court to direct suit upon an alleged cause of action would seem rather to prevent a stockholder from suing thereon, than to give occasion for his doing so, unless the court expressly authorized him to sue. [Cites and quotes *Porter* v. *Sabin*]."

It is held that the lack of an allegation showing that the receivership court has permitted the stockholder to assert the derivative action renders the court wherein it is asserted unable to know whether it is, by entertaining the claim, improperly interfering with the court wherein the receivership is pending. *Lewis* v. *Lilliston* (U. S. App. D. C., 1937), 89 F. 2d 847. For failure to show leave of the Missouri district court, this action must fail.

But this case goes even beyond the situation where a litigant fails to show leave of the receivership court to sue on a cause of action of the receivership corporation. Here, after the most painstaking inquiry over a matter of years

by the receivership court and the Interstate Commerce Commission upon petitioner's persistent allegations of conspiracy and wrongdoing on the part of respondents' railroad and other roads, the court wherein the railroad corporation is undergoing reorganization denied his request for leave to continue this claim. See statement *ante*, p. 9. Refusal of leave is a bar to petitioner's further assertion of the claim. *Klein* v. *Peter* (C. C. A., 8th, 1922), 284 Fed. 797, 799, and authorities cited.

Where the receivership court has denied petitioner leave further to prosecute the claim, the only question is whether that court abused its discretion in the circumstances. *Continental Ill. Natl. Bank* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 677; *Guaranty Tr. Co.* v. *Henwood* (C. C. A., 8th, 1936), 86 F. 2d 347, 352. Petitioner's remedy, if the court erred in refusing him leave, is by appeal to the United States Circuit Court of Appeals for the Eighth Circuit. Its action and its discretion cannot be collaterally impeached in this cause. *Grant* v. *A. B. Leach & Co.*, 280 U. S. 351, 359-360.

4. If a stockholder is to bring a derivative action, asserting not his own right but that of his corporation, it is settled that he must join the corporation as a party defendant. He is not permitted the extraordinary right not only to litigate another's cause of action but also to do it in the latter's absence. *Davenport* v. *Dows*, 18 Wall. 626; *Coyle* v. *Skirvin* (C. C. A., 10th, 1942), 124 F. 2d 934, cert. denied, 316 U. S. 673, No. 1050, O. T. 1941; *Adler* v. *Seaman* (C. C. A., 8th, 1920), 266 Fed. 828, 836. Cf. *Price* v. *Gurney*, 324 U. S. 100; *Lewis* v. *Lilliston* (U. S. App. D. C., 1937), 89 F. 2d 847. Here petitioner attempted exactly that.

While this ground of decision of the master and district court was not relied upon by the court of appeals, it can properly be considered by this Court as a ground for

sustaining the judgment below. *Langnes* v. *Green*, 282 U. S. 531, 535-539.

In *Davenport* v. *Dows*, 18 Wall. 626, this Court held:

> "* * * such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. * * * a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation. * * *"

The master (R. 36, 43, 45-47), whose report was approved by the district court (R. 52), pointed out that since petitioner failed to bring before the court below either the corporation whose right he was asserting, or its trustee after the petition for reorganization was filed, or the directors whose collusion was alleged to have given rise to the claim, there was really no proper claim before the court. It is now too late to file a claim; time for filing claims expired more than eleven-and-one-half years ago (R. 46). As a common stockholder whose interest will be wiped out by the plan of reorganization of St. Louis Southwestern (R. 46), petitioner has no personal interest to serve at the present time; and therefore no amendment of the claim ought to be permitted (R. 46); cf. *Case* v. *Los Angeles Lumb. Co.*, 308 U. S. 106, 116-119. No abuse of discretion in refusing leave to amend the claim by bringing new claimants and defendants before the court could be shown in this case, where petitioner has litigated this claim at such lengths before the Interstate Commerce Com-

mission, pursuant to the provisions of § 77 of the Bankruptcy Act (R. 46), and the Missouri district court, 53 F. Supp. 914, 925, 927.

5. Not only is petitioner's corporation, St. Louis Southwestern, in reorganization, but the Rock Island of which respondents are trustees is likewise subject to the exclusive jurisdiction of a court of bankruptcy. So far as is concerned, respondents as trustees, the District Court of the United States for the Northern District of Illinois possesses "all the powers * * * which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose" (§ 77[a]). After full consideration of the question whether petitioner might continue with his claim against respondents as trustees, it was held by the court having jurisdiction of the respondents that petitioner might not further prosecute this claim. Petitioner's failure to secure leave of the court effectively bars his right to proceed. *Barton* v. *Barbour*, 104 U. S. 126, 128; *Porter* v. *Sabin*, 149 U. S. 473, 479. Failure to secure leave of court to sue its receiver is jurisdictional, and the action cannot thereafter be maintained. *Merryweather* v. *United States* (C. C. A., 9th, 1926), 12 F. 2d 407; and see *Lewis* v. *Lilliston* (U. S. App. D. C., 1937), 89 F. 2d 847.

In the light of denial to petitioner by the Illinois district court of leave to proceed further against respondents the only question inherent in the case is whether the Illinois district court has abused its discretion. *Continental Ill. Nat. Bank* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 677; *Guaranty Tr. Co.* v. *Henwood* (C. C. A., 8th, 1936), 86 F. 2d 347, 352. No abuse of discretion is shown where petitioner has had protracted hearings on his allegations over the course of many years, and the only effect of further hearings would be even longer delays in the approval of reorganization plans for the Rock Island and for St. Louis Southwestern.

Conclusion

As applied to this case, the wisdom of the rule that a stockholder who does not have consent of the court cannot proceed with a derivative action on behalf of his corporation after it shall have gone into receivership or bankruptcy is more than apparent. Petitioner has persisted more than a decade in litigating his claims of fraud, collusion and conspiracy; he has filled the records of the courts and the Interstate Commerce Commission with the history of his attempts to document his charges; he has caused the trustee of his debtor to make reports—not once, but over years of time—on his charges. Plans for the reorganization of petitioner's debtor, St. Louis Southwestern, and of respondents' debtor, Rock Island, have now respectively reached that stage where petitioner's efforts not only do not help him, but where petitioner is now delaying steps looking to the winding up of the proceedings. As a stockholder of St. Louis Southwestern, petitioner has no remaining interest of his own, but is managing to interfere with the rights of all security holders of that road and of Rock Island who do have an interest in the reorganized corporations—and that despite the fact that the Missouri district court refused him leave to pursue this proceeding. His standing to cause further delay and expense by proceeding further herein was properly denied.

The judgment of the court below should be affirmed.

Respectfully submitted,

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Of Counsel.

APPENDIX

Provisions of § 77 of the Bankruptcy Act, as restated in the amendment by Act of August 27, 1935, c. 774, 49 Stat. 911 et seq. (11 U. S. C. § 205).

SEC. 77. REORGANIZATION OF RAILROADS ENGAGED IN INTERSTATE COMMERCE.—

(a) Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction such corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the "Commission"). * * * If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district. * * *

(c) After approving the petition:

* * * * * * *

(2) * * * The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 44 of this Act or any other section of this Act, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by the Interstate Commerce Act as now or hereafter

amended, the power to operate the business of the debtor. Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as he may from time to time impose and prescribe.

* * * * * * *

(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. * * *

(13) * * * The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, shall have the right to be heard on all questions arising in the proceedings, and, upon petition therefor and cause shown, any such person or any other interested party may be permitted to intervene. * * *

(*l*) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed.

SUPREME COURT OF THE UNITED STATES.

No. 392.—October Term, 1945.

Walter E. Meyer, Petitioner,
vs.
Joseph B. Fleming and Aaron Colnon, as Trustees of the Chicago, Rock Island and Pacific Railway Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 4, 1946.

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner is the owner of a substantial number of shares of stock of the St. Louis Southwestern Railway Company. In April 1934 he filed a claim for the benefit of St. Louis Southwestern in the bankruptcy proceedings which previously had been instituted under § 77 of the Bankruptcy Act (49 Stat. 911; 11 U. S. C. § 205) for the reorganization of the Chicago, Rock Island & Pacific Railway Co. The claim filed was a claim for a cause of action which St. Louis Southwestern allegedly had against the Rock Island. It amounted to many millions of dollars and arose out of an alleged conspiracy between the Rock Island and others to control the St. Louis Southwestern to their own interest in breach of their fiduciary relationship to St. Louis Southwestern, and in violation of the antitrust laws. It was stated in the claim that a demand on the board of directors of St. Louis Southwestern to file the claim was not made because it would be futile, the dominant stockholder and the directors of St. Louis Southwestern being parties to the conspiracy. In May 1935 the trustees of Rock Island objected to the claim by general denial. In December 1935—about a year and a half after the claim had been filed—St. Louis Southwestern filed a petition for reorganization under § 77 of the Bankruptcy Act. Shortly thereafter the petition was approved and a trustee was appointed. Thereupon the trustees of Rock Island further objected to the claim filed by petitioner on the ground that all causes of action belonging to St. Louis Southwestern had become vested in its bankruptcy trustee and could no longer be asserted in the Rock Island proceeding by petitioner. The claim

was referred to a special master who, in February 1942, filed his report, concluding that petitioner should not be allowed to prosecute the claim. Two years later the District Court approved the special master's report and disallowed the claim. On appeal the Circuit Court of Appeals affirmed. 149 F. 2d 529. The case is here on a petition for a writ of certiorari which we granted because the problem presented is an important one in bankruptcy law.

The Circuit Court of Appeals held that a stockholders' derivative suit commenced before the corporation's petition under § 77 had been approved could not be continued thereafter without permission of the reorganization court. It relied on the provisions of § 77 which gave the reorganizing court exclusive jurisdiction of the debtor and its property[1] and which give a trustee appointed in those proceedings the title and powers of other bankruptcy trustees.[2] But the exclusive jurisdiction granted the reorganization court by § 77 (a) is that which bankruptcy courts have customarily possessed.[3] And the title and powers of the trustee are by § 77 (e) (2) assimilated to those of trustees in ordinary bankruptcy proceedings. Certainly, so far as the enforcement of

[1] § 77(a) provides in part:

"If the petition is so approved, the court in which such order is entered shall during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district."

§ 77(1) provides:

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

[2] § 77(e)(2) provides in part:

"The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 44 or any other section of this Act, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding."

[3] Isaacs v. Hobbs Tie & T. Co., 282 U. S. 734, 737-738; Ex parte Baldwin, 291 U. S. 610, 615; Continental Illinois Nat'l Bank v. Chicago, R. I. & P. Ry. Co., 294 U. S. 648, 682-684; Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 483. And see Thompson v. Terminal Shares, Inc., 104 F. 2d 1. Cf. In re Standard Gas & Electric Co., 119 F. 2d 658, 661, arising under § 77B.

claims are concerned, there is no indication that Congress adopted a different rule in proceedings under § 77 than had long obtained in ordinary bankruptcy proceedings. Yet, if the view of the Circuit Court of Appeals were followed, any suit which had been brought by the corporation before its petition under § 77 had been approved would be defeated when that event happened. That is not the rule in ordinary bankruptcy proceedings. And it would be a radical change in the law to write that rule into § 77.

Litigation instituted by a creditor may not be defeated merely by reason of the fact that he has become a bankrupt. *Thatcher v. Rockwell*, 105 U. S. 467, 469-470. Title to the claim vests, of course, in the bankruptcy trustee.[4] He is in position to take control of the litigation. He may, as indicated in *Johnson v. Collier*, 222 U. S. 538, 540, start a new suit[5] and cause the old one to be abated, or intervene in the old one[6] and obtain such benefits as it affords.[7] The choice may indeed be a valuable one. Rights might be lost if the earlier suit were abated. And the speculative nature of the litigation or the expense involved might indicate to the trustee that it was more provident for him not to intervene in the existing suit, nor to institute a new one, but to let the one which had been started run its course.[8] As stated in *Johnson v. Collier*, *supra*, p. 540,

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[4] Sec. 70 of the Bankruptcy Act, 52 Stat. 879, 11 U. S. C. § 110. The same is true under § 77 by reason of the provision in § 77 (c) (2), *supra* note 2.

[5] Sec. 11 (c) of the Bankruptcy Act, 11 U. S. C. § 29 (c), authorizes a receiver or trustee, within two years subsequent to the adjudication or within such further period of time as federal or state law permits, to institute proceedings in behalf of the estate upon any claim against which the statute of limitations had not expired at the time of the filing of the petition in bankruptcy.

This provision is applicable to proceedings under § 77 by reason of § 77 (c) (1), set forth in *supra* note 1.

[6] Sec. 11 (c) of the Bankruptcy Act, 52 Stat. 849, 11 U. S. C. § 29 (c), provides that "A receiver or trustee may, with the approval of the court, be permitted to prosecute as receiver or trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him." This provision is likewise applicable to proceedings under § 77 (c) (1), *supra* note 1.

[7] And see Danciger v. Smith, 276 U. S. 542; Bluegrass Canning Co. v. Steward, 175 F. 537, 543-544; Paradise v. Vogtlandische Maschinen Fabrik, 99 F. 2d 53, 55; Bennett v. Associated Theatres, 247 Mich. 493, 496; Griffin v. Mutual Life Ins. Co., 119 Ga. 664.

[8] If the suit is continued by the bankrupt, the trustee is concluded by the judgment. Eyster v. Gaff, 91 U. S. 521, 524-525; Paradise v. Vogtlandische Maschinen Fabrik, *supra* note 7, p. 55.

"If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large as possible, and in some States the more direct interest of creating a fund which may be set apart to him as an exemption. If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee. The defendant in any such suit can, by order of the bankrupt court, be amply protected against any danger of being made to pay twice."

The same rule obtains in equity receiverships.[10]

We see no reason why there should be a different rule in the case of stockholders' derivative suits. They are likewise suits to enforce a corporate claim. They are one of the remedies which equity designed for those situations where the management through fraud, neglect of duty or other cause declines to take the proper and necessary steps to assert the rights which the corporation has.[11] The stockholders are then allowed to take the initiative and institute the suit which the management should have started had it performed its duty. The corporation is a necessary party *Davenport* v. *Dows*, 18 Wall. 626. Hence, it is joined as a defendant. But it is only nominally a defendant, since any judg-

[9] As stated in Van der Stegen v. Neuss, Hesslein & Co., 270 N. Y. 55, 59-60: "the trustee in bankruptcy is not obliged to maintain or continue every cause of action which the bankrupt may have. He is not bound to accept burdensome property nor unprofitable contracts (*Atchison, T. & S. F. R. Co.* v. *Hurley*, 153 Fed. Rep. 503; affd. 213 U. S. 126), nor is he obliged to intervene in any action pending by or against the bankrupt. (*Kessler* v. *Herklotz*, 132 App. Div. 278; *Fleming* v. *Courtenay*, 98 Me. 401. If a trustee does not take up the prosecution of a suit the defendant is not released even where the right of action is one that might have passed to the trustee. The bankrupt may continue the prosecution of the action. (*Griffin* v. *Mutual Life Ins. Co.*, 119 Ga. 664.) The relationship, therefore, between the bankrupt and his trustee is for one and the same purpose—to get out of the bankrupt's property and claims enough money to pay his debts and to relieve the bankrupt, through his discharge, from further responsibility."

[10] See Missouri, K. & T. Trust Co. v. German Nat'l Bank, 77 F. 117, 122-123; Boston Elevated Ry. Co. v. Paul Boynton Co., 211 F. 812, 822-823; Hartford Accident & Indemnity Co. v. Federal Bond & Mortgage Co., 58 F. 2d 950, 956. See 1 Clark on Receivers (2d ed., 1929) §§ 614, 615.

[11] Glenn, The Stockholder's Suit, 33 Yale L. Journ. 580.

ment obtained against the real defendant runs in its favor. The reasons of policy for holding that ordinary suits to enforce a corporate claim are not abated when the corporation is adjudged a bankrupt or when a receiver is appointed are equally applicable here. The claim sought to be enforced in a derivative suit may be an important asset of the estate. It might be lost to the estate through the operation of statutes of limitations, if the trustee or receiver were required to start anew. As in case of ordinary suits to enforce corporate claims, he should be allowed a choice to let the suit continue under the stockholders' auspices;[12] to intervene in it;[13] to start a new suit; or, in case he deems it more provident from the point of view of the estate to make a settlement of the claim or to reserve it for the reorganized company, to cause it to be abated.[14] He might conclude that the more provident course was to let the suit continue without interference.[15] That decision might be dictated by the speculative nature of the suit and the expense involved as *Johnson* v. *Collier*, *supra*, indicates. If the trustee will not sue and the stockholder cannot continue with the litigation, what might turn out to be a valuable claim might be lost to the estate not only through the operation of statutes of limitation, but in cases like the present through a discharge of the debtor.[16] The point is that the trustee or receiver, being in a position to take control of the litigation by reason of the fact that the cause of action has become a part of the estate, should have the opportunity to make the choice which is most advantageous to the estate. Cf. *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483. The fact that the corporation is nominally a defendant should not lead to any different result.[17] That gives the suit only a difference in form, not a difference in substance.

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[12] Cf. American Steel Foundries v. Chicago, R. I. & P. Ry. Co., 231 F. 1003; Seagrist v. Reid, 171 App. Div. 755, 759. And see 4 Cook on Corporations (8th ed. 1923) § 748.

[13] Meyer v. Page, 172 App. Div. 625, 627; Floyd v. Layton, 172 N. C. 64.

[14] Moreover, the stockholder's suit might so intimately affect the administration of the bankruptcy or receivership estate as to require that it be continued only under the auspices of the trustee or receiver. See Adler v. Seaman, 266 F. 828, 835-837; Seaman v. McCulloch, 8 F. 2d 820, 825-826.

[15] In re National Republic Co., 109 F. 2d 167, 171; McAnarney v. Lembeck, 97 N. J. Eq. 361.

[16] Sec. 77(f) provides for the discharge of the debtor "from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved."

[17] But see Coyle v. Skirvin, 124 F. 2d 934, 937-938 (receivership). The provision in § 77(j) empowering the court to "enjoin or stay the com-

We have in the present case not a stockholders' derivative suit filed before the bankruptcy of his corporation, but a claim filed in the bankruptcy proceedings of the alleged debtor (Rock Island) by a stockholder on behalf of his corporation, St. Louis Southwestern. If the claim were to be filed after the petition for the reorganization of St. Louis Southwestern had been approved, it could be done only with the consent of the bankruptcy court. For it has exclusive authority to determine how causes of action which have become a part of the bankruptcy estate shall be enforced. See *Porter* v. *Sabin*, 149 U. S. 473; *Klein* v. *Pate*, 284 Fed. 797. But since the claim was filed before the petition of St. Louis Southwestern under § 77 had been approved, no reason is apparent why that event should have a different effect on the claim than it would have had on a suit which had been previously instituted by or on behalf of the corporation. Indeed, the facts of this case emphasize the reason for giving the trustee an opportunity to choose what course to take. The claim was filed in April 1934, a year and a half prior to the time when the petition of St. Louis Southwestern under § 77 had been approved. We are told that the time for filing of claims against the Rock Island expired over eleven years ago. If the claim were now disallowed, the trustee of St. Louis Southwestern, if he desired to assert it, would be faced with the task of obtaining leave to file out of time.[18] There is, therefore, the same reason for allowing the estate to obtain the benefits of the claim which has been filed, as there would be for allowing the trustee the opportunity to take over a stockholders' derivative suit previously instituted.

It is said, however, that the claim was properly disallowed because the corporation on whose behalf the claim was filed was not

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mencement or continuation of suits against the debtor until after final decree" obviously relates to suits where claims are asserted against the debtor, not where the debtor is made a nominal defendant for the purpose of obtaining a judgment in its favor.

[18] Sec. 77(c)(7) provides that the judge "shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown." This is the equity rule (5 Collier on Bankruptcy (1944) p. 537) which permits the filing of claims out of time provided the claim is equitable, the claimant is not chargeable with laches, and the assets have not been distributed (see Conklin v. United States Shipbuilding Co., 136 Fed. 1006, 1009-1010; Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 740-742); and provided further that the late filing does not unduly delay the proceedings. Guaranty Trust Co. v. Henwood, 86 F. 2d 347, 353.

before the court. As we have said, the corporation is a necessary party in a stockholders' derivative suit. *Davenport* v. *Dows*, *supra*. It can be joined as a party and brought in by summons in the usual way. But the filing of a claim in bankruptcy is not the institution of a plenary suit. It is a claim against assets in the hands of the bankruptcy court, not an action *in personam*. The absence of the corporation is a proper basis for an objection to the claim. But there is no way available to the stockholder to join it in the claim other than by moving the bankruptcy court to bring it in. The bankruptcy court has that power.[19] The objections to the present claim, however, were not based on the absence before the court of St. Louis Southwestern or its trustee.[20] But whether such an objection was made or not, the proper and necessary procedure for the bankruptcy court is to summon in the corporation or its trustee so that all parties will be bound by any order which is entered on the merits.[21]

It is said, however, that by reason of events which have transpired since St. Louis Southwestern filed its petition for reorganization under § 77, the claim which Meyer filed in the Rock Island reorganization proceedings was properly disallowed. In the first place, it appears that a reorganization plan for the St. Louis Southwestern has been approved by the District Court. *In re St. Louis Southwestern Ry. Co.*, 53 F. Supp. 914. The Interstate Commerce Commission in preparing the plan investigated Meyer's charges and concluded that they had no substantial support. *St. Louis Southwestern Ry. Co. Reorganization*, 249 I. C. C. 5, 46-149; 252 I. C. C. 325, 330-337. It refused to recommend that the cause of action be reserved in the plan of reorganization. 252 I. C. C. pp. 334-335. The District Court concurred in that recommendation (53 F. Supp. p. 925), saying that the trustee had investigated the charges, found no basis for instituting legal proceed-

[19] Sec. 2(a)(6) of the Bankruptcy Act, 11 U. S. C. 511(a)(6), grants the court power to "Bring in and substitute additional persons or parties in proceedings under this Title when necessary for the complete determination of a matter in controversy." See 1 Collier on Bankruptcy (14 ed. 1940), pp. 214-218.

[20] One of the grounds on which the Special Master based his recommendation for disallowance of the claim was that the claim was improperly filed in the first instance since the corporation was not made a party. But the District Court, like the Circuit Court of Appeals, proceeded on the ground that the claim could no longer be prosecuted after approval of the petition for the reorganization of St. Louis Southwestern unless the bankruptcy court in that proceeding expressly authorized it.

[21] Cf. 14 Boston Univ. L. Rev. 802, 808.

ings on behalf of St. Louis Southwestern, and that there was no charge that the trustee had acted in bad faith or had shown a lack of diligence. 53 F. Supp. 926. Moreover, we were advised on oral argument, although the matter does not appear of record, that a motion of Meyer in the St. Louis Southwestern proceedings for an order directed to the trustee to show cause why Meyer should not be permitted to prosecute the claim filed by him in the Rock Island proceedings was denied in February 1944. The grounds of this denial do not appear. We can infer, on the basis of the opinion of the District Court confirming the plan, that the motion was denied because the court was of the view that the claim had no substance. But a decision of the court not to direct or authorize its trustee to undertake the prosecution of a claim is one thing; the problem presented here is quite a different one. While the court might not deem it provident to have the estate assume that burden, the continuation of the prosecution of the claim by Meyer might be wholly compatible with the disposition of the claim by the reorganization court or with the administration of the estate. It is not apparent in this case that there would be any such inconsistency in view of the fact that the plan makes no provision for the claim. As stated in *Johnson* v. *Collier*, *supra*, p. 540, "If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability."

The order disallowing the claim will be reversed. On remand of the cause the District Court will allow the claim to be amended by joining St. Louis Southwestern or its trustee. If it is established that the continued prosecution of the claim will be inconsistent with the plan of reorganization of St. Louis Southwestern or the administration of its affairs, the claim should be disallowed. If it is not so established, the claim should then be considered on its merits.

So ordered.

Mr. Justice FRANKFURTER and Mr. Justice JACKSON took no part in the consideration or decision of this case.